

Edward Macculloch, - - - - - Appellant.

Janet Macculloch, - - - - - Respondent.

The Appellant's CASE.

IN 1749 the Appellant, though in independent Circumstances, by having an Estate of his own, lived in Family with his Brother-in-law *Edward Macculloch*; at which time the Respondent, who is the Appellant's distant Relation, lived in the same Family as a Governess to the Children; and being then about thirty-three Years of Age, five Years older than the Appellant, who was but twenty-eight, she used various Arts to draw him into an amorous Intrigue. The Appellant lay in a Summer-House in the Garden detached from the Dwelling-House, which was crowded with Children and Servants; but the Respondent got into a Way of coming, after the rest of the Family were asleep, to the Summer-House in the Garden, where the Appellant lay; her first Visit surprized him, but she repeating her Visits, and taking care to come dressed suitably to her Inclinations, only in a loose Gown and Smock-Petticoat, at last gained her Point, and inveigled the Appellant into improper Familiarities; which, however secretly and artfully conducted, were at last discovered in the Family; and her Motions being watched, she was missed one Night out of her Bed-Room, and the Matter being narrowly enquired into by her Master and Mistress, she was, in *August* or *September* 1750, turned out of the House, as an improper Person for the Charge of their Children.

She retired to her Mother's House big with Child, but kept her Pregnancy a profound Secret; and when she could not conceal it any longer, used all the Intreaty and Sollicitation imaginable with the Appellant to get her conveyed to some remote Place, there to stay until she should be delivered, threatening even to destroy herself, in case he refused.

The Appellant, from Compassion, not only agreed to bearing the Charge of her Journey to, and Residence in, the *Isle of Man*, until her Delivery, but also to accompany her thither himself; for which Purpose he called at her Mother's House one Evening, in *September* or *October* 1750, and without any Notice to her Mother or Sisters of her being with Child, or of her Reason for going away, she and he went off together privately in the Night, staid five or six Days in a Boatman's House at a Village on the Sea-Shore, waiting for their Passage to the *Isle of Man*; during which Time, she concealed herself from the Notice and Observation of People thereabout, and when she thought herself in danger of being discovered by the Landlady of the House, denied her Name and Family, and continued under Disguise, till she took her Passage with the Appellant; and arriving in the Island, they took up their Quarters at the House of one *Matthew Dore*, in the Village of *Peeltown*, where they lay in different Beds and different Rooms; and after staying a Night or two at *Peeltown*, proceeded to a Village called *Douglas*, where they lodged in the House of one *John Areskine* for eight or ten Days, lying in separate Beds and separate Rooms.

During this Time the Parties had no Imagination of Marriage, and though the Appellant had attended her to the Island for the Purpose of concealing her Situation, he notwithstanding avoided Appearances, which might give People occasion to think they were Man and Wife. After staying eight or ten Days in *Douglas*, they found they could not be well accommodated, or even meet with a civil Reception there, or any where in the Island, while the Appellant and Respondent should behave only like travelling Companions. The Appellant had no Business in the Island, which could account for his coming there, far less for his coming attended by a female Companion big with Child, he was to leave her in that Place, and to return to *Scotland*; so that from his natural Tenderness, and her artful Importunity, he agreed to their assuming the Disguise of Man and Wife for some Time, without which she could not expect to be well treated during his Absence, nor well attended during her lying in; and it was even apprehended, that in his Absence she might be turned out of Doors. They therefore departed from *Douglas*, where they found their Behaviour as travelling Companions would not be at all agreeable, and returned to *Matthew Dore's* in *Peeltown*, and there assumed the Disguise of Man and Wife, by bedding together, as they had often done formerly, though more clandestinely; which Behaviour imposed upon their Landlord and Landlady, and some other People of the Place, among whom the Appellant and Respondent passed of Course for Man and Wife.

The Appellant, after staying in the Isle about three Weeks, returned to Scotland, and in three or four Weeks came back to the *Isle of Man*. Soon after which, the Respondent was delivered, and the Appellant, consistently with his former Disguise of appearing to be the Respondent's Husband, sent for and paid a Midwife, bespoke a Godfather and Godmother to attend the Christening, and gave them a Name for the Child, without discovering the Illegitimacy, or disclosing any Part of the Secret; and of Course the Child's Name was entered in the Parish-Register, without being called a Bastard.

A few Days after the Respondent's Delivery, the Appellant went back to Scotland, and some Time after, when she was almost recovered, and in a Condition for travelling, he returned to the *Isle of Man*, in Order to fetch her back to Scotland; and upon his Arrival, was arrested at the Suit of Messrs. Black and Ross, Merchants, for a pretended Debt; but was set at Liberty upon Bail, which however kept him in the Island, and engaged his Time and Attention until he could settle Matters with Black and Ross, which being done, he and the Respondent took their Passage for Scotland in March 1751, leaving the Child at Nurse in the Isle; and as their Behaviour to each other there was only intended to screen the Respondent from the Disgrace of her then Condition, and to procure her a proper Accommodation and Good Treatment, during her Pregnancy and lying in: So, that Purpose being accomplished, they no longer kept up the Disguise of Man and Wife; but arriving on the Coast of Scotland, they separated: She was put ashore at a Place called *Portyarrow Bay*, from which she went alone to her Mother's House; and the Appellant landed near to his Brother-in-Law's House of *Ardwall*, where he had formerly resided.

Soon after, the Child died in the *Isle of Man*, where it had been left to be nursed.

In the Course of twelve Months after the Respondent's Return from the *Isle of Man*, the Appellant made her three or four short Visits at her Mother's, but neither the Respondent's Mother nor her Sisters knew any Thing of what passed between her and the Appellant at those short Visits; nor pretended that she was married to him, nor called him her Husband; nor was it hitherto insinuated by them that they looked upon the Appellant and Respondent as Husband and Wife.

Feb. 1755.
The Respondent's present Action.

After these four short Visits last mentioned, the Appellant broke off all Correspondence and unlawful Intercourse with the Respondent, and never saw her: She acquiesced, and was quiet for a considerable Time; and then, in Hopes of extorting a Sum of Money from him, she set up Pretensions as if she was, or had a Title to be, his lawful Wife; but those Pretensions were stilled for a considerable Time by the Appellant's paying no Regard thereto: At last in February 1755, after a Taciturnity of four Years, she brought an Action of Declarator against the Appellant in the ecclesiastical Court of the Commissaries of *Edinburgh*, libelling that she and the Appellant having Occasion to pass some Years together in the Family of Mr. *Macculloch* of *Ardwall*, a common Relation, a Courtship ensued betwixt them, and in Consequence thereof a Marriage was celebrated betwixt them privately in the House of *Ardwall*, upon the eighth of March 1750: That in the Month of September following, the Respondent was prevailed on by the Appellant to leave *Ardwall's* Family, where she served in the Station of a Governess to *Ardwall's* Children, and return to her Mother's House, and in a few Days thereafter was prevailed upon by the Appellant to go with him to the *Isle of Man*, where they resided and cohabited as Husband and Wife, from the Month of September or October 1750, till the Month of March 1751; and that during this Period, she brought forth a male Child to the Appellant, that the said Child was baptized, and acknowledged by the Appellant as born to him in lawful Wedlock, and that upon their Return to Scotland, the Respondent resided in her Mother's House for the Space of two Years, that the Appellant visited and cohabited with her from Time to Time as her Husband, but still desired her and her Mother and Relations to keep the Marriage a Secret till he should build a House upon his own Estate: And at this Period he had frequently acknowledged his being married to the Pursuer, to different Persons: From all which she concluded, that it ought to be found and declared, that she and the Appellant were actually married together: At least, Separatim, that they ought to be decerned, bolden and declared married Persons in Respect of their Cohabitation, and being habite and repute married Persons, as aforesaid: And that the Appellant ought to be decerned to adhere to her as his lawful Wife.

Appellant's Defences against the Respondent's Action.

The Appellant made several Defences to this Action.—He denied that ever he had been married to the Respondent, or ever promised to marry her; but admitted there had passed Familiarities between them, in Consequence of which, she, as he believed, had been delivered of a Child: That their Familiarities and unlawful Intercourse did not proceed from any Courtship on the Appellant's Part, or from any Arts or Seducements of his, to betray her Virtue; but on the Contrary, from her own forward and sollicitous Behaviour; and that these Familiarities, or any Consequence that had resulted from them, could be no Foundation for establishing a Marriage against the Appellant, which he never had in his View or Intention; that what passed in the *Isle of Man* could be no Foundation for a Marriage; for though by the Disguise there assumed, the Respondent passed with some Persons for the Appellant's Wife, and the more easily as her Father's Name was the same with his; yet among others in the Island, the Respondent was not considered as the Appellant's Wife, but as his Mistress: And the Appellant never did acknowledge, say, or declare, to any Person, that there was a Marriage between them, or that she was his lawful Wife: That neither the Disguise put on in the *Isle of Man*, which was assumed for the particular Purpose of saving her from Shame and Reproach at the Time, and for procuring her proper Lodgings and civil Treatment during her Pregnancy and Lying-in, (which Disguise was laid aside as soon as the Purpose of it was accomplished,) nor the Apprehensions and Imaginations of the People about them, occasioned by the disguised Appearances of the Parties in the Island, could be any Foundation for establishing a Marriage against the Appellant: And supposing, what was not the Case, that there had been a proper conjugal Cohabitation between the Parties in the *Isle of Man*; yet that being a foreign Country, not subject to the Laws of Scotland, and by the Law of the Island, Cohabitation, or any Thing less than actual Celebration of Marriage not being held of any Importance to the Constitution of Marriage, Cohabitation had in that Island could not be a Foundation, in the Law of Scotland, for subjecting the Appellant to the pretended Marriage; and that the Conduct and Behaviour of the Parties at their returning from the Island to Scotland, and after their Return, when they separated, and

and put themselves on their former Footing, shewed that neither did the Appellant intend Marriage, nor the Respondent imagine herself to be married, or to have any Claim to Marriage.

Respondent's
Answers to
the Appel-
lant's De-
fences.

In Answer hereto the Respondent insisted, that at her lying in, in the Village of *Peeltown* in the *Isle of Man*, the Appellant acted with the Tenderness and Care of a Husband; that the Child was christened in the publick Church by the Parson of the Parish as lawfully begot: that the Appellant had belpoke the Sponsors and given the Christian Name for the Child; that the Child's Name and Christening were registered as of a Child lawfully begot; that after the Child's Birth they continued to cohabit at Bed and Board, as Husband and Wife, and that she was visited as such by certain Persons in *Peeltown*; that upon her Return to *Scotland*, the Appellant made her sundry Visits at her Mother's House, where they were allowed to bed together; and averred, that her mother would not have permitted them to bed together in her house, unless she had thought them Married Persons; that they were really married, and that an actual Celebration of Marriage passed between them on the Day and in the Manner alledged in the Respondent's Libel.

Aug. 1, 1755.
Interlocutor
of the Com-
missaries, al-
lowing Proofs
to both Par-
ties.

The Appellant replied—And the Commissaries, by their Interlocutor of the first of *August*, 1755, Having advised the libel, with the Defences, Answers and Replies, before Answer, allowed the Pursuer a Proof of her libel, and of all Facts and Circumstances relative thereto; and allowed the Defender, i. e. the Appellant, a Proof of what is set forth in his Defences, and allowed each Party a conjunct Proof about the Premises, and granted Diligence *hinc inde*.

Proofs taken
both in Scot-
land and the
Isle of Man.

They also granted a Commission to both Parties for taking Proofs, as well in the *Isle of Man* as in *Scotland*, under which many witnesses were examined, and long Proofs taken, both in *Scotland* and in the *Isle of Man*.

No Proof of
a Celebration
of Marriage.

As to the actual celebration of the marriage, alledged and averred by the Respondent in her Libel with great assurance, she did not bring the smallest Proof of a Fact thus confidently averred: on the contrary, her Allegation was clearly disproved and falsified, and it plainly appeared that her Intent in making such Allegation, was only to deceive and impose upon the Court by a Falshood, contrived to give a Colour of Relevancy to her Libel, which otherwise must, and certainly had been quashed in the Beginning; and to induce the Commissaries to grant her a Proof at large, in hopes that some-

Proofs in the
Cause.

what for her Purpose might, by proper Address and Management, be brought out, or Money be ex-

Printed De-
positions.

orted from the Appellant, who might chuse to part with it, rather than stand a tedious Litigation in so disagreeable a Suit.—The Respondent's own Brother deposed, that she told him she could not prove

Henry Mac-
culloch, p. 46.

her Marriage, and that there never was any actual Ceremony of Marriage between her and the Appellant.

Nicholas Gib-
son, p. 92.

Another Witness deposed, That in Answer to a Question asked by the Witness at the Respondent, Whether she was married to the Appellant, or no? she said, No Matter for the Ceremony of Marriage,

William Ca-
meron, p. 94.

when People own each other, and live together publicly as Man and Wife. And a third Witness de-

posed, That after observing the Commerce that had been between the Respondent and the Appellant in the Summer-House in the Garden, he the Deponent took the Liberty to ask her if she was married or to be married to the Appellant, she answered, she thought not, nor would not be married to him.

William Ca-
meron, p. 94.

The Respondent brought no Proof, nor could she, of any Addresses or Courtship from the Appel-
lant, or of his taking Advantage of their Intimacy and Correspondence while in his Brother's Family,
to engage her Affections or betray her Virtue; but it came out clearly in Evidence, that the Courtship
and Solicitation was wholly of her Side; that her forward Addresses to the Appellant, and her inde-
cent and loose Conduct gave Offence in the Family of *Edward Macculloch*, where she lived, and occa-
sioned her being turned off; and that after her going Home to her Mother's she kept her Pregnancy a
secret, until she prevailed upon the Appellant to go with her to the *Isle of Man*.—One Witness de-
posed, that he saw the Respondent in her loose Gown and Smock Petticoat, pass from the house of
Ardwall (i. e. *Edward Macculloch's*) into the Summer-House where the Appellant then slept; and
another Night saw her come out of the Summer-House in the same Undress, and at sundry other
Times both by Night and Day. And several other Witnesses deposed, that in Harvest 1749, they
observed the Respondent frequenting the Appellant's Room under night; that Mrs. *Macculloch* one
Night ordered the Doors to be locked upon the Respondent, and complained greatly of her loose
behaviour.

Grizel Mac-
culloch, p. 54.

As to the alledged conjugal Cohabitation, she proved none such in *Scotland* before they went to the
Isle of Man, nor after her Return; but only that the Appellant had made her four Visits within a
Year at her Mother's House, at some of which he staid all Night with her in a Room where there was
but one bed, and where the Witnesses did not suppose the Appellant and Respondent did sit up all
Night, but rather lay together. But there was no Sort of Evidence of the Respondent's Mother
knowing any thing of their bedding together in her House; nor Evidence that they then believed
them to be, or considered them as Husband and Wife, though some Persons in the House might sus-
pect that they did bed together there; and might, at the Respondent's Desire, have connived at the
Appearance of their Bedding, in Conformity to the Respondent's Views and Hopes, that the Appel-
lant would at last make her his Wife.—The only Thing like a Cohabitation proved, was what passed
in the *Isle of Man*, which, though she had all along averred to have been constant and continued as
Man and Wife, for the Space of six Months, it nevertheless came out, and was true, that in the
Space of five Months, during which the Respondent stayed in the Island, the Appellant had a Sort of
Cohabitation with her for about six or seven Weeks in all, and that at straggling Periods, instead of
the six Months alledged by her; and, from the Import of the Evidence, this pretended Cohabitation
as Man and Wife, could not be considered any other than what it truly was, an unlawful Correspond-
ence without the genuine Appearance of a Conjugal Cohabitation; it appearing that several Persons
in the *Isle of Man* did in reality look upon the Respondent, during her pretended Conjugal Cohabita-
tion, to be the Appellant's Mistress, not his Wife.

Robert Mac-
kinnel, p. 81.

Alex. Mac-
adam, p. 82.

Sarah Thom-
son, p. 84.

Mary Mac-
taggart, p. 86.

Nicholas Gib-
son, p. 90.

Grizel Mac-
culloch, p. 50.

Jane Maccul-
loch, p. 54.

M. Dore, p. 3.

J. Dore, p. 6.

Mrs. Aref-
kine, p. 66.

John Aref-
kine, p. 67.

James Mac-
master, p. 88.

John Maccul-
loch, p. 61.

Mat. Dore,
p. 1, &c.

Mrs. Dore,
p. 6, &c.

As to which, and the different Apprehensions of People concerning them, *Matthew Dore* the
Landlord, in whose House they lodged in *Peeltown*, and his Wife, deposed, That, upon their
Arrival at their House in *Peeltown*, neither of them said they were married, and that they lay in differ-

John Aref-
kine, p. 66.

Robert Chri-
stie, p. 70.

Mabel Rad-
cliffe, p. 31.
Margaret
Wattleworth,
p. 72, 73.

John Watson,
p. 16.

Mr. Wilks,
p. 25.

Mr. Brew,
p. 23.

John Maccul-
loch, p. 36.

Samuel Wal-
ker, p. 58.

James Gor-
don, p. 58.

John Maccul-
loch, p. 59.

W. Gordon,
p. 63.

Eliz. Agnew,
p. 65.

Marg. Max-
well, p. 78.

Mrs. Egle-
sham, p. 81.

Alex. Maca-
dam, p. 83.

Sarah Thom-
son, p. 85.

James Mac-
master, p. 87.

ent Rooms. Another Witness, the Innkeeper in *Douglas*, deposed, That, upon their coming to his House, the Appellant asked for separate Rooms and Beds for himself and the Respondent; and that, during their whole Stay at *Douglas*, which was for eight or ten Days, they slept in separate Rooms and Beds; and that, so far as he saw, they did not behave to one another as Husband and Wife, but in such Manner as is ordinary with Neighbours and Friends; and that the Respondent appeared to him to be with Child. Another deposed, That the Appellant and Respondent did not appear to him in the Character of Man and Wife, and that he saw them at different Times in the Island, both before and after the Birth of the Child; that, in his Opinion, it was partly their Intention of coming to the Island to conceal the Birth of the Child from their Friends in *Scotland*, and that he has heard of Men and Women who lived in the Island under the Character of Man and Wife, but afterwards parted. Another deposed, That she visited the Respondent as the Appellant's Wife, but she did so, without asking any Questions as to their Marriage. Another deposed, That the Appellant, coming to her House in *Ramsay* in *March*, 1751, enquiring for a Passage-Boat to carry him and some Women to *Scotland*, she, the Deponent, said, she thought that had been over with him, and that he had been married to the Gentlewoman who she heard was at *Peeltown* with him; at which he seemed to be angry, and said it was not come that Length yet; and, upon an Interrogatory for the Respondent, deposed, that she heard many more say that they were not married than that they were, and that a *Scotsman* being in the Deponent's House, in Company with several others, she asked him if he knew that the Appellant was married to the Woman that was with him at *Peeltown*; and he answered that they were no more married than he and the Deponent. Another Witness deposed, That he has heard of such Sort of Cohabitation in the Island, when at the same Time it was known, or generally reported, that the Parties were not married, both before and after they left the Island. The other Witnesses, who had Occasion to visit the Respondent in the *Isle of Man*, in general deposed, That they did not ask whether the Appellant and she were married Persons, or not. The Parson of the Parish (without asking the Question whether the Appellant and Respondent were married) deposed, That he believed the Parties were married, but could not recollect whether the Appellant had applied to him to Christen the Child, and that, where there was no Suspicion with respect to Strangers, their Children were set down in the Register as legitimate, without any Inquiry into the Truth of the Marriage; and the Curate of the Parish deposed to the same Purpose.

As to the Respondent's Pretence of *habite and repute*, i. e. that the Appellant and she were taken by Reputation and Report to be married Persons, it came out in Evidence that there was no established Reputation about the Matter, but only a conjectural Talk or vague Report, in which it was variously spoken of, and that this Talk arose only after the Appellant and Respondent returned from the *Isle of Man*. One Witness deposed, That he heard the Respondent had a Child to the Appellant, but whether in Marriage, or out of Marriage, he did not know, and heard it reported both Ways. Another Witness deposed, That he knew the Parties in this Cause, and that he heard a Report, after their Return from the *Isle of Man*, that they were married together, and heard it also reported that they were not married. Another deposed, That there was a Clatter in the Country that the Appellant and Respondent were married, but which was variously reported. Another deposed, That it was variously reported as to their being married or not married; that *David Macculloch*, the Deponent, and the Appellant's Brother, having been in the *Isle of Man* while the Appellant and Respondent stayed there, and *David* having returned from thence, he, the Deponent, asked him, if, or not, he understood the Appellant and Respondent were married; to which he answered that he could not tell, but that he had seen them in a Room together. Another Witness deposed, That he heard it asserted, that there was not any Ceremony of Marriage performed between the Appellant and Respondent; and he also heard it asserted that there was a Ceremony performed in the Kiln of *Ardwall*, and that he frequently heard the Appellant had denied a Marriage with the Respondent, but could not say whether he heard so before or since this Action brought. Another Witness deposed, She never heard of the said rumoured Marriage till the Time the Appellant and Respondent went to the *Isle of Man*. Another Witness deposed, She did not hear, till a long Time after the Appellant and Respondent went to the *Isle of Man*, that they were married, nor did she yet know whether the Appellant and Respondent were married, and she heard it reported they were not married. Another deposed, that she has heard it reported that they were and that they were not married. Another Witness deposed, That, after the Respondent had left *Ardwall's* Family, and went to the *Isle of Man*, there was a common Report, both in the Family of *Ardwall* and in the Country about, that the Appellant and Respondent were married; but he never heard such a Report before she left the Family; and it was reported they were married in the *Isle of Man*, or in *Ireland*. Another Witness deposed, That she never heard any Thing of a Marriage between the Parties till after their Return from the *Isle of Man*, when a Report arose that they had been either married in the Kiln of *Ardwall*, in the *Isle of Man*, or in *Ireland*. And another Witness, in whose Boat the Appellant and Respondent had their Passages to and from the *Isle of Man*, and who had Occasion to see them frequently during their Stay in the Island, deposed, That the Appellant and Respondent assumed no other Character than what they had before they went away to the *Isle of Man*; that he could not learn from either of the Parties that they were Man and Wife, nor did their Behaviour to one another give him any Ground to suspect they were; he never told *Matthew Dore*, or his Wife, that the Appellant and Respondent were married, nor did ever either the Appellant or Respondent say so to the Deponent.

The Respondent produced some Witnesses, who deposed to their hearing the Report of the Appellant and Respondent being married, and to their own Belief of the Marriage, after the Parties returned from the *Isle of Man*. But such sort of Evidence, when it appeared from the other Parts of the Proof that the Report was various and different, could be of no Consequence; whether the Witnesses heard or believed the one Report or the other, could be of no Importance.

Elizabeth
Agnew, p. 64.

One Witness deposed, That she, the Deponent, and *David Macculloch*, the Appellant's Brother, being in Company together in the Period while the Appellant and Respondent were in the *Isle of Man*, the Deponent asserted that the Parties were certainly married, and *David* asserted they were not, and wagered a Pair of Gloves against the Deponent, upon his Assertion; that *David*, having afterwards been in the Island while the Appellant and Respondent were there, upon his Return told the Deponent he had lost his Wager, for that he believed the Appellant and Respondent were married, or Words to that Purpose.

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Purpose, and ordered her the Gloves. But this Evidence, importing no more than that *David* conjectured the Appellant and Respondent were married, could have no Effect whatever.

Jane Donaldson, p. 35.
Robert Nash, p. 38.
In order to make out the Respondent's Allegation, in her Libel, of an Acknowledgment by the Appellant of the pretended Marriage, she examined many Persons in regard to vague Conversations and Imaginations. One Witness deposed, That upon the Faith of the Report of the Appellant and Respondent being married, the Deponent, upon the Appellant coming one Day into her Shop, asked him how his Wife was; upon which he made her a Bow, and smiled on her. Another Witness deposed, That, upon the Rumour which then prevailed of the Appellant and Respondent's Marriage, the Deponent asked the Appellant for Mrs. *Macculloch*, and drank her Health, and that the Appellant thanked him, and said she was pretty well; but the Deponent could not take upon him to describe whether the Appellant meant the Respondent or his Sister Mrs. *Macculloch* of *Ardwall*;—which are all too trifling to found an Acknowledgement upon.

Henry Macculloch the Respondent's Brother, p. 43.
The Respondent then produced, as a Witness for her, *Henry Macculloch* her own Brother, who was at the whole Expence of carrying on her Action, the Conductor of it, and greatly interested in the Event, not having any Prospect of being reimbursed of the great Expence of the Suit, but by prevailing in it; on which Account, the Appellant objected to his Competency; but the Commissioners allowed him to be examined, reserving to the Court to determine what Credit ought to be given to his Evidence. He deposed, That, at a Meeting between him and the Appellant, the latter proposed that he, the Deponent, should give him his Post or Place of Tide-Surveyor in the Customs, in Lieu of any Portion the Respondent had a Claim to, or Words to that Purpose; and that, at an After-meeting, the Deponent shewed the Appellant a Letter he had wrote to *Castle Stewart*, desiring the Appellant might be preferred to succeed him in the said Office, assigning as the Reason, that the Appellant was married to his Sister.—But this Witness was unsupported by any other Evidence, and is much to be suspected, by reason of his Connection with the Respondent, and his Concern in the Suit; and though the Fact sworn to, if true, might have been easily supported, by producing the Letter to *Castle Stewart*, or by *Castle Stewart*'s own Oath, yet neither were produced; and it appeared clearly, from other Parts of the Evidence, that the Appellant had applied for the Office of Tide-Surveyor in a different Channel, and, after the Dismissal of *Henry*, obtained it by Interest quite different from what *Henry* mentioned in his Deposition.

James Gordon, p. 58.
John Macculloch, p. 59.
P. 60.
The Respondent endeavoured to support her Brother's Evidence by a Circumstance mentioned by another Witness, who deposed, that in a Conversation with *John Macculloch*, the Appellant's Brother, after the Report of the Appellant and Respondent being married, and about *Henry Macculloch*'s disposing of his Office, *John Macculloch* said, that *Henry Macculloch* might give it to his Brother-in-Law, whom the Deponent understood to be the Appellant, but deposed he could not say, whether *John Macculloch* was in Joke or in Earnest. But when *John Macculloch* himself was examined, he deposed, agreeably to all the other Witnesses, that the Story of the Marriage was so variously reported, that the Deponent could form no Opinion, whether the Appellant was married or not: And with Regard to the Conversation which passed between him and *James Gordon*, deposed, that what he said of *Henry Macculloch*'s giving his Office to the Appellant was said in Joke.

Further, in Order to make out the Respondent's Allegation of a pretended Acknowledgment, she proved, that on some different Occasions in the *Isle of Man*, the Appellant spoke of her to others by the Epithet of *Wife*, that at the taking of Lodgings for her in the House of *Matthew Dore* in *Peeltown*, when he found that Lodgings could not be had, unless she was to pass for his Wife, he mentioned her as his Wife to the Landlady, by telling her he wanted Lodgings for his Wife, that at different Times, in ordering the Servants of the House to call the Respondent to Breakfast, he used this Expression, *Call in my Wife to Breakfast*, and on some other Occasions at mentioning the Respondent, used the Expression of *Wife* to the People he had been speaking to; and this Proof, joined with the Respondent's Condition, the Birth of the Child, and the Appellant's not disclosing the Child's Illegitimacy; but suffering the Midwife, the Persons who acted as Sponsors, and the Parson and Curate of the Parish, to be deceived, and to consider the Child as a Child lawfully begot, the Respondent contended did amount to an Acknowledgment of the Marriage.

But without any Proof, that ever the Appellant used the Expression of *Wife* to any Person in the Respondent's Presence, or that she ever called him her Husband; and as she did not prove, that the Appellant ever said or declared to the Midwife, or to the Sponsors, or to the Parson or Curate of the Parish, or to any other Person, that he was married to the Respondent, or that the Child was lawfully begot, but only, that those Persons imagined they were married, the Appellant's using the Expression of *Wife* on some few Occasions, loosely and at Random in the Manner mentioned by the Witnesses, though it might imply a Desire or Intention that Persons for the present should think them married, which was not inconsistent with the Knowledge both of the Appellant and Respondent that they were not, could not amount nor be construed to an Acknowledgment on the Appellant's Part sufficient to constitute a Marriage.

The Respondent further proved, that Mr. *Wilks*, the Parson of the Parish, after the christening of the Child, drank a Glass to her speedy Recovery, under the Name of Mrs. *Macculloch*, without any Objection from the Appellant, who was present.—But the Appellant had no Reason to object to the Appellation of Mrs. *Macculloch*; *Macculloch* having been her Father's Name, Mrs. *Macculloch* was proved to have been the Name she commonly went by in all the Families where she had lived.

P. 9.
She relied on a Passage in the Deposition of Mrs. *Dore*, as importing the Appellant's Acknowledgment of a Marriage, in these Words, That some Time after the Appellant and Respondent left the Island, he came there about Business, and upon the Deponent's asking him if it was true, that he was denying the Respondent to be his Wife, he answered he did not know what Business any Fellow or Huffy had to ask such damned impertinent Questions; and asked the Deponent who had told her so, to which she returned for Answer, that Mrs. *Maxwell* in *Wigtown* had told her the Deponent, that some

some Women in *Wigtown*, in whose House the Appellant had been had told Mrs. Maxwell that the Appellant had been speaking flightingly of his Wife, and denying her to which the Appellant had returned the Deponent for answer, that it was a damned Lie, for that he would take Care of Jenny, and that those who said he denied her did not love him, or Words to that Purpose.

P. 45.

P. 15.

The Respondent next relied on a Passage in the Deposition of her Brother *Henry Macculloch*, and on a Passage in the Deposition of *John Watson*, for making out the pretended Acknowledgment. Her Brother deposed, that having asked the Appellant the Reason why she concealed his being married upon the Respondent, he told him he had good Reasons of his own; but at the same Time said he would shew he had as great a Regard for her as the Deponent had. *Words to that Purpose.*—*Watson* deposed, That in the *Ile of Man* one *Tedford* having taken the Appellant to task, by telling him it was reported that he was not married to the Respondent, the Appellant answered it was false, and that his Reason for bringing the Respondent to the Island was because he had no House; and he intended to build a House to take her to.

Pages 45,
46.

But in Place of having any Influence or Effect against the Appellant, whose Passages of the Proofs relied upon by the Respondent, shewed in a strong Light the Uncertainty and Delusion of her Evidence. Her Brother deposed, upon an Interrogatory for the Appellant, that the Appellant never told him, the Deponent, that he was married to the Respondent, nor did ever the Deponent ask the Appellant the Question, seeing he had told him he was to keep it a Secret, further than at his Commending aforesaid with the Appellant about his Reasons for keeping the Marriage a Secret; and deposed, that the Respondent, before her going to the *Ile of Man*, did not tell the Deponent she was married to the Appellant, and after her Return from the Island, the Deponent did not ask her, whether she was married or not, because it was given out they were to keep the Marriage a Secret; that before the Respondent returned from the *Ile of Man*, the Deponent heard she and the Appellant were married privately at the House of *Ardwall*, and that by Report only. The Absurdity and Contradiction plainly implied in the Words of the last quoted Passage of this Deposition, when compared with the former Passage quoted for the Respondent, made the Whole of this Evidence to be of no Importance nor Effect. And as to the Passage quoted by the Respondent from the Deposition of *Watson*, the Witness deposed, that he did not remember, whether he was present at the communicating between the Appellant and *Tedford* or not, or whether or not *Tedford* told him.—Neither does he say how or by what Means he came to know or hear of the Conversation; which was most extraordinary, and on which Account no Sort of Regard could be due or paid to such absurd Evidence.

P. 45.

Aug. 18, 1758.
Unanimous
Interlocutor
of the Com-
missaries ab-
solving the
Appellant.

Upon mutual Informations on the Import of the Proofs and Merits of the whole Cause, the Commissaries, 18 August, 1758, with great Unanimity, pronounced the following Interlocutor: *Having considered the Libel, Defences, Answers, Replies and Duplies, Proof adduced for both Parties, together with the State of the Process, and whole Proceedings in the Cause, find the Facts, Circumstances and Qualifications proven not relevant to infer Marriage, and therefore absolve (acquitt) the Defender (Appellant) and decern.*

Bill of Advoca-
tion for the
Respondent
to the Lords
of Session,
complaining
of the Com-
missaries In-
terlocutor.
Appellant's
Answer to the
Bill of Advoca-
tion.

The Respondent preferred a Bill of Advocation to the Lords of Session, complaining of this Interlocutor, and urging, that though she had brought no Proof of an actual Celebration of Marriage, yet the Facts and Circumstances proved by her were sufficient, by the Law of Scotland, to establish a Marriage from the implied Consent of Parties, and therefore praying the Lords to advocate the Cause to themselves, or to remit it to the Commissaries, with an instruction to declare the Marriage.

Replies given
in for the
Respondent.
Duplies for
Appellant.
27th February
1759. Inter-
locutor of the
Lords of
Session—Not
unanimous—
Appealed
from.

The Appellant in Answer urged, that as the Allegation of an actual Marriage was false and groundless from the Beginning, and the Respondent had not attempted any Proof thereof, nor brought sufficient, or indeed any Evidence of a deliberate serious Acknowledgment of Marriage on the Appellant's Part, or of any solemn Consent of his to the pretended Marriage; nor had she exhibited a single Letter or other Writing under his Hand, importing such Acknowledgment or Consent; and that taking the Evidence in the strongest Light for the Respondent, in Regard to the Appellant's Behaviour before his Familiarities with her, whilst she was a Servant in his Brother's Family, or after she had been turned away on Account of her indecent Behaviour; or after she had, in order to conceal her being with Child, prevailed upon the Appellant to convey her to the *Ile of Man*, or during her Stay in the Island; and even after her Return to Scotland, no such Facts or Circumstances were proved as could bind the Appellant, or shew that he had any Intention of taking the Respondent for his Wife; and therefore that the Interlocutor of the Commissaries was just and agreeable to Law.

The Respondent, in her Reply, was forced to acknowledge, that no actual Marriage was celebrated or Ceremony performed between her and the Appellant: And the whole Matter having been reported to all the Lords by the Lord Kaims, Ordinary, they were divided in Opinion; but the Majority differing from the Commissaries, upon the 27th of February, 1759, Lord Ordinary gave the following Interlocutor—*After advising with the Lords refuses this Bill, but remits the Cause to the Commissaries with this Instruction, That they find the Marriage proven.*

From which Interlocutor the Appellant hath appealed, and humbly hopes it will be reversed, and the Commissaries Interlocutor of the 18th of August, 1758, affirmed, for the following among other

REASONS.

1. The Respondent's Allegation of a Marriage actually celebrated between her and the Appellant, the Foundation of all the present vexatious Proceedings, and contrived to give a Colour of Relevancy to her Action, having been disproved, and at last given up by her as false; her whole Superstructure made up of vague Circumstances, of an imaginary and uncertain Meaning, fell of course, together with

[7]

with her Allegation : And although Cohabitation has in some Cases been held for presumptive Evidence of Marriage, yet such Cohabitation must be of an open and publick nature; must subsist for a long tract of time, and be notorious in the neighbourhood, so as to exclude all fallacy and Uncertainty : but in this Case no Cohabitation is proved to have been in Scotland, either before the Respondent's going to the *Isle of Man*, or after her Return from it.

- II. The Contract or Covenant of Marriage, which so greatly concerns a Man's Fortune, and the future Happiness of his Life, ought not to be established by presumptive Proofs, arising from vague and uncertain Circumstances, which require the Aid of artificial Reasoning to turn an immoral or unlawful Cohabitation into an actual or presumed Marriage, which is not the Punishment the Law has provided for Familiarities of the Nature that passed between the Appellant and Respondent.
- III. As there was no Cohabitation in *Scotland*, Proof ought not to have been allowed of a Cohabitation in the *Isle of Man*, where nothing less than actual Celebration is by Law sufficient to constitute Marriage; it being an established Principle in the Laws of all Nations, that the Import and Effect of Persons Actions are to be judged according to the Law of the Country where they resided for the Time; the Law of *Scotland*, therefore, could have no Operation upon Actions done in the *Isle of Man*, different from what the Law of the Island would have.
- IV. Supposing the pretended Cohabitation in the *Isle of Man* had been in *Scotland*, it could not, from its Shortness, have constituted a Marriage; deducting the Time the Appellant was absent from the Respondent during her Stay in the Island; the disguised Cohabitation there had, did not subsist above six or seven Weeks; but Lord *Stair*, Sir *Thomas Craig*, and other Writers on the Law of *Scotland*, hold a continued open Cohabitation for Years to be requisite, and it ought also to be at the Husband's House of Residence, where if he treated a Woman as his Wife, it must naturally be understood, that he intended making her such.
- V. Had the Appellant, by Letter or other Writing, actually acknowledged a Marriage, or given the Respondent any Promise or Encouragement, to flatter herself with the Hope of such, or seduced her to believe that their private mutual Consent would be equivalent to an actual Celebration of Marriage, the Decree of the Court of Session might perhaps be just; but as there is not a tittle of all this even pretended, the Decree cannot be supported by any of the Proofs in the Cause.

RO. DUNDAS.

AL. FORRESTER.

with her Allegation: And although Cohabitation has in some Cases been held to be presumptive Evidence of Marriage, yet such Cohabitation must be of an open and public nature, must last for a long time of time, and be notorious in the neighbourhood, so as to exclude all secrecy and Uncertainty: but in this Case no Cohabitation is proved to have been in Scotland, either before the Respondent's going to the East Indies, or since her Return thence.

[illegible]

111. -As there was no participation in Scotland, Proof ought not to have been allowed of a Contribution in the Isle of Man, where nothing less than actual Contribution is by Law sufficient to constitute Rights; the being an established Principle in the Law of all Nations, that the Import and Effect of the same Actions are to be judged according to the Law of the Country where they related for the Time; the Law of Scotland, therefore, could have no Operation upon Actions done in the Isle of Man, but for so far as the Law of the Island would have.

Had the Applicant, by letter or other Writing, acknowledged a liability or given the Respondent any promise or acknowledgment to the effect that the Jobs of Jack, or Edward, or to those that their representatives would be available for an actual Celebration of Wharfedale the Board of the Court of Session might have been satisfied that it is not a title of all this even granted, the Board cannot be supported by any of the facts in the Cause.

R. O. DUNDAS.

ALFONSO

Edward Macculloch, - Appellant.
Janet Macculloch, - - Respondent.

The Appellant's C A S E.

*To be heard at the BAR OF THE HOUSE OF LORDS,
on Tuesday the 15th Day of May, 1759.*